

FCC MAIL SECTION

MAY 4 2 23 PM '99 Federal Communications Commission DA 99-815

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 99-139
Table of Allotments,)	RM-9402
FM Broadcast Stations.)	RM-9412
(Princeville, Kapaa and Kalaheo, Hawaii))	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 21, 1999

Released: April 30, 1999

Comment Date: June 21, 1999

Reply Comment Date: July 6, 1999

By the Chief, Allocations Branch:

1. In this proceeding we are combining two interrelated petitions for rule making involving the community of Princeville, Hawaii, into a single docket. The first petition for rule making, filed by Vetter Communications Co., Inc. ("Vetter Communications"), permittee of Station KAWT, Channel 255C1, Princeville, Hawaii, proposes the reallocation of Channel 255C1 to Kapaa, Hawaii, and modification of the Station KAWT construction permit to specify Kapaa as its community of license (RM-9402).¹ The second petition for rule making, filed by B&GRS Partnership ("B&GRS"), permittee of Station KAYI, Channel 260C1, Princeville, Hawaii, proposes the reallocation of Channel 260C1 to Kalaheo, Hawaii, and modification of the Station KAYI construction permit to specify Kalaheo as its community of license (RM-9412). Both rule making proponents have stated their intention to file an application to implement these proposed reallocations. We are combining these petitions for rule making because favorable action on both of these petitions will result in Princeville not having any local service.

2. Each petition for rule making was filed pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New

¹In regard to this proposal, we have also received an unsigned letter from Radio Tour/USA. According to Radio Tour/USA, it provides a visitor information service on the island of Kauai using the frequency 98.9 MHz (FM Channel 255) under Part 15 of the Commission's Rules. Princeville and Kapaa are located on the island of Kauai. Under Section 15.5 of the Commission's Rules, this is a secondary service that must cease operation or seek an alternate frequency in the event of harmful interference to an authorized primary service. In this connection, we note that this secondary operation will cause interference to Station KAWT at either Princeville or Kapaa. Any request to delete the underlying Channel 255C1 allotment for Station KAWT and reassign this frequency to a visitor information service is outside the scope of this proceeding.

Community of License ("Community of License"), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990). In considering a reallocation proposal, we compare the existing allotment versus the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).² As noted earlier, favorable action on both reallocation proposals will result in Princeville not having any local service. This concern is ameliorated by the fact that neither Station KAWT nor Station KAYI has commenced operation in Princeville. Nevertheless, the benefits and technical feasibility of maintaining local service at Princeville will be considered in making a determination of a preferential arrangement of allotments.

3. In support of its proposal for a first local service at Kapaa, Vetter Communications states that Kapaa is a census designated place with a population of 8,149 persons, compared to the Princeville population of 1,244 persons. In regard to Kapaa, Vetter Communications notes that Kapaa has its own fire department, post office and numerous governmental services, including its own water treatment plant. In addition to its own medical facilities and services, Kapaa has its own commercial establishments, banks, lodging facilities as well as churches and civic organizations. Finally, Vetter Communications states that Princeville will continue to receive service from ten other stations.

4. In support of its proposal for a first local service to Kalaheo, B&GRS states that Kalaheo is a census designated place with a population of 3,592 persons. B&GRS notes that Kalaheo has its own fire station, post office, churches and local businesses. In addition, B&GRS contends that Channel 260C1 facilities cannot be constructed at Princeville because of environmental opposition to available transmitter sites and a terrain obstruction that would preclude line-of-sight principal city service to all of Princeville. B&GRS also indicates that Princeville will continue to receive service from ten other stations.

5. In view of the above, we set forth two proposals. First, we propose to reallocate Channel 255C1 from Princeville to Kapaa, Hawaii, and modify the Station KAWT construction permit to specify Kapaa as the community of license.³ Second, we propose to reallocate Channel 260C1 from Princeville to Kalaheo, Hawaii, and modify the Station KAYI construction permit to specify Kalaheo as the community of license.⁴ In addition, if we determine that only one reallocation will be permitted, each proponent should provide any additional information in response to this Notice

²The FM allotment priorities are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. (Co-equal weight is given to priorities (2) and (3).)

³The reference coordinates for a Channel 255C1 allotment at Kapaa, Hawaii, are 22-04-42 NL and 159-19-19 WL.

⁴The reference coordinates for a Channel 260C1 allotment at Kalaheo, Hawaii, are 21-59-54 NL and 159-25-35 WL.

that it believes will demonstrate the greater need for a first local service at its proposed community of license.⁵ Finally, in accordance with Section 1.420(i) of the Rules, we will not accept a competing expression of interest in either Channel 255C1 at Kapaa or Channel 260C1 at Kalaheo.

6. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Kapaa, Hawaii	--	255C1
Kalaheo, Hawaii	--	260C1
Princeville, Hawaii	255C1, 260C1	--

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before June 21, 1999, and reply comments on or before July 6, 1999, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, S.W.; TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Harry C. Martin, Esq.
Andrew S. Kersting, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
(Counsel for Vetter Communications Co., Inc.)

⁵The communities of Princeville, Kapaa and Kalaheo are all located on the island of Kauai. A Class C1 facility will provide a 60 dBu service to the entire island regardless of the community of license. For this reason, it will not be necessary for either proponent to submit an engineering exhibit depicting the areas and populations that will gain and lose service.

and

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, DC 20036
(Counsel for The B&GRS Partnership)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY A-257), at its headquarters, 445 Twelfth Street, SW., Washington, D.C.